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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDRE TARAY FRANKLIN, Defendant and Appellant.	A104528 (Alameda County Super. Ct. No. 133423)

Andre Taray Franklin appeals from the imposition of sentence following a probation revocation hearing, challenging on statutory and constitutional grounds the manner in which his sentence was calculated. We affirm.

BACKGROUND

On July 23, 1998, Franklin pleaded no contest to one count of receiving stolen property (Pen. Code, § 496). He admitted to five prior convictions, four of which were for second degree burglary and one of which was for petty theft with a prior conviction. Although Franklin could have been sentenced to a maximum of eight years in prison, the court suspended imposition of sentence and placed Franklin on probation for eight years.

On May 13, 1999, a probation revocation petition was filed on the ground that Franklin had failed to report to his probation officer. After a hearing, the revocation order was affirmed and probation was reinstated. On December 13, 2002, a probation revocation petition was filed alleging Franklin had committed robbery (Pen. Code, § 211) and had possessed drug paraphernalia (Health & Saf. Code, § 11364), and that he had

failed to report to his probation officer. On December 20, 2002, the court summarily revoked probation, then restored probation on the same terms and conditions on February 11, 2003.

On February 26, 2003, a petition to revoke probation was filed alleging Franklin had committed second degree burglary (Pen. Code, § 459) and received stolen property (Pen. Code, § 496). The attached police report alleged Franklin was arrested for breaking into a parked car and stealing a car stereo. A probation revocation hearing was held on September 3, 2003, at which the court found by a preponderance of the evidence that Franklin was in violation of his probation. The court imposed an eight-year sentence on the 1998 conviction, consisting of the upper term of three years for receiving stolen property and one additional year for each of the five prior felonies. Franklin timely appealed.[1]

DISCUSSION

Sentencing factors

Franklin argues that in sentencing him to eight years in prison the trial court impermissibly considered his behavior after the initial imposition of probation. Initially, the Attorney General suggests Franklin waived his right to object to the sentence by not raising these arguments below. Generally, "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) This rule does not apply if the defendant had no meaningful opportunity to object at the time the sentence was imposed. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.)

In this case, the prosecution proposed that the court impose the full eight-year sentence, and the defense proposed "a year in county jail or county time, or the low term of 16 months on his probation if you're inclined to send him to prison." The judge then

[1] We requested additional briefing on the issue of timeliness. After reviewing the parties' briefs, we agree that the appeal was timely filed. Franklin's unopposed motion to augment the record is granted.

asked Franklin if he wanted to say anything. Franklin started to reply, "I don't feel as though eight years, I mean, that's—." The judge interrupted and asked the bailiff, "How much time does he already have in?" After receiving an answer, the judge proceeded to lecture Franklin on the harm caused by his crimes, then announced the sentence. She then addressed restitution and stated, "There's a thing where you have to impose another fine of $100, and that will not be suspended." Franklin's counsel corrected, "Stayed," and the judge repeated, "Stayed unless he violates his parole, once he's placed on parole. Okay." The hearing was then adjourned.

The Attorney General contends that by correcting the judge's word choice, Franklin's counsel demonstrated there was a meaningful opportunity to object. We agree. In *Gonzales*, after the court announced the sentence, the defendants objected and the trial court heard those objections and ruled on them. While the Supreme Court expressed a preference for a more formalized opportunity for objection, it held the defendants had sufficient opportunity to object as evidenced by the interposition of actual objections. (*People v. Gonzalez, supra,* 31 Cal.4th at p. 752.) Here, no such objections were offered. It would have been preferable for the trial court to have affirmatively solicited objections, thus obviating any ambiguity in the record. However, we are satisfied from the record that before the hearing was adjourned Franklin's counsel had the opportunity to interpose an objection if he had desired to do so.

There is likewise no merit to Franklin's assertion that he was denied effective assistance of counsel because his attorney did not object to the sentence imposed. The sentence was authorized by statute, even if the trial court considered improper factors in imposing it. California Rules of Court, rule 4.435(b)(1) provides that at the time probation is revoked, "[i]f the imposition of sentence was previously suspended, the judge shall impose judgment and sentence . . . . [¶] The length of the sentence shall be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term nor in deciding whether to strike the additional punishment for enhancements charged and found."

In *People v. Harris* (1990) 226 Cal.App.3d 141, the court interpreted this rule to permit a trial court to consider a defendant's subsequent behavior where the defendant had been placed on probation, and probation had been revoked and then reinstated on modified terms. The court held that the reinstatement of probation amounted to a new grant of probation within the meaning of the rule and therefore that the trial court may consider the defendant's behavior between the initial grant of probation and the subsequent revocation and modification of probation. (*Id.* at p. 146.) We decline to disregard *Harris*, as Franklin urges us to do. When determining Franklin's sentence, the trial court was entitled to consider the two intervening probation revocations and reinstatements between the initial grant of probation in 1998 and the reinstatement of probation in February 2003.

The court erred, however, in considering the crime for which the current probation revocation proceeding was initiated. In sentencing Franklin, the trial judge stated, "One of the things that bothers me, you know, people say this is just a minor little crime, just smashing somebody's window. I mean, put yourself in the victim's place. This is like a total invasion of people's privacy and it's not . . . a little crime. It's a serious crime to the person that it happens to. And if this had been the first time that this happened, I might consider a low term. But this is like, I mean, I guess this is your M.O. I don't know what it is, or what you're trying to become. The car burglary king of this area? I don't know what you're trying to do here. And I guess you do have some kind of drug issue, and maybe that's what's going on here, but this is unacceptable behavior. You're making the streets unsafe and also you're making the—you're giving certain areas a very bad reputation. People don't want to live here. You walking the lake, you know, you out there walking the lake, if that's what you were doing, I don't know what you were doing, or if you ever walk the lake, but cars are burglarized around that lake all the time. And I think you're a danger to the community and I think you need to go away."

The trial judge then imposed sentence, stating, "So he's going to be sentenced to the maximum of eight years, three years on the 496, which is a maximum because that is the—I don't know how many times he's gotten caught, and I don't know how many

times he hasn't gotten caught, but he certainly got five—five priors plus three violations of this particular probation and now another one. So that's at least nine car burglaries going on, or that kind of, or that kind of activity going on in our community that we are not going to accept. So he's sentenced to the maximum of three years on the 496 and one year each for each of the five priors." In doing so, the trial court erred in two regards. First, the judge indicated that the three prior violations of probation were for theft crimes, when the record indicates that the 1999 revocation petition was filed because Franklin had failed to report to his probation officer. More importantly, however, it is clear from the above speech, and from the pronouncement of sentence, that the trial court was punishing Franklin in part for having committed the most recent car burglary, rather than considering only the original crime and Franklin's behavior prior to the last reinstatement of probation.

Nevertheless, any error was harmless because "it is not reasonably probable that a more favorable result would occur absent consideration of this circumstance." (*People v. Downey* (2000) 82 Cal.App.4th 899, 917.) There is no question but that Franklin was eligible for an eight-year sentence on the original crime for which he received probation. At the time he was sentenced in 1998, the negotiated plea arrived at a term of eight years by selecting the upper term of three years for receiving stolen property, and adding a year for each of five prior convictions, each of which was for a crime of theft.[2] The fact that Franklin was on probation at the time the original crime was committed, and his poor performance on probation, both of which were noted in the probation report filed in 1998, and the fact that no mitigating factors appear in the record, merited imposition of the upper term.[3] (Cal. Rules of Court, rule 4.421(b)(4) & (5).) Although the trial court, in

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[2] Four of the prior convictions were for second degree burglary and one was for petty theft with a prior.

[3] The 1998 probation report also suggests that the upper term should be imposed because Franklin had six prior prison terms. However, since the court enhanced his sentence by one year for each of five of those priors, they could not properly be used by the court in selecting the upper term. (See Cal. Rules of Court, rule 4.420(c).)

sentencing Franklin on the probation violation that he now appeals, relied on impermissible and inaccurate information in selecting the maximum eight-year sentence, it is not reasonably likely that a different result would be reached if the case were remanded for resentencing. (See, e.g., *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1303 ["Again, a remand for a resentencing would, on this record, be a wholly idle act, as the record is replete with adequate reasons for selection of the terms imposed, and no other result is reasonably (or even rationally) likely in the event of a remand"].)

Blakely

After the briefs were filed in this case, the United States Supreme Court announced its decision in *Blakely v. Washington* (2004) 542 U.S. __ [124 S.Ct. 2531, 2543] (*Blakely*), in which it held that under the Sixth amendment to the United States Constitution "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." We granted Franklin's request to submit supplemental briefing, and the Attorney General submitted a responding brief. Franklin argues that the trial court could not properly impose the upper term of three years for the violation of section 496 without a jury determination of the factors, other than prior convictions, that led the court to depart from the middle term of two years.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the Supreme Court held that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely,* the high court applied that rule where the defendant had received a sentence more than three years longer than the prescribed statutory sentence because the trial judge determined that the defendant had acted with "deliberate cruelty," an aggravating factor under Washington law that justified an upward departure in sentencing. (*Blakely*, *supra*, 542 U.S. at p. __ [124 S.Ct. at p. 2537].) "In a very real sense, *Blakely* merely represents the Supreme Court emphasizing it meant what it said [in *Apprendi*]." (*People v. Juarez* (2004) 124 Cal.App.4th 56, 64 (*Juarez*).) "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge

may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely*, *supra*, 542 U.S. at p. __ [124 S.Ct. at p. 2537].)

Initially, the Attorney General argues that Franklin waived his right to raise this issue by failing to object at the trial court level. *Blakely* was decided after sentencing occurred in this case. Although there is a split of authority on this issue, the weight of authority is that a defendant who failed to raise this issue before *Blakely* was decided cannot be held to have waived this objection since the law was not then settled, and an objection would have been futile. We agree. (See *People v. Picado* (2004) 123 Cal.App.4th 1216, 1234 ["*Blakely* was not decided until after Picado was sentenced. As of that time, there was no reported decision holding that an upper term sentence violated the Sixth Amendment if premised on factors found by the trial court rather than a jury. California courts and numerous federal courts held there was *no* constitutional right to a jury trial in connection with a court's imposition of consecutive sentences. [Citation.] To be sure, *Blakely* has been described as having 'worked a sea change in the body of sentencing law' "]; *Juarez, supra*, 124 Cal.App.4th at p. 71.)

We turn then to the merits of Franklin's argument that he was denied his Sixth Amendment rights when the trial court imposed the upper term of three years without a jury determination of the aggravating factors. First, we agree with the majority of the courts that have considered the issue that *Blakely* applies when a trial court imposes a sentence greater than the mid term. *Juarez*, in particular, makes a compelling case that California's determinate sentencing law cannot be meaningfully distinguished from the law that was invalidated in *Blakely*. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely*, *supra*, 542 U.S. at p. __ [124 S. Ct. at p. 2537]; see also *Juarez, supra,* 124 Cal.App.4th at pp. 83-84 ["In this court's view, it is difficult to distinguish the California sentencing scheme from the Washington system in a way

which avoids the *Apprendi-Blakely* problem and impossible to do so without elevating form over substance, something the Supreme Court has cautioned it will not tolerate"]; but see *People v. Picado*, *supra,* 123 Cal.App.4th at p. 1241 ["In the final analysis, the fact that section 1170, subdivision (b), mandates a middle term in the absence of aggravating or mitigating factors is immaterial to the concerns expressed in *Blakely*. Section 1170, subdivision (b), does not permit the trial court to exceed the maximum sentence prescribed for the crime in the charging statute. Nor does it require the finding of a particular fact in order to divert from the statutory maximum. Rather, it merely guides the trial court's discretionary selection of the proper term *from within the statutory range* for the subject offense"].)

The Attorney General argues that even if *Blakely* applies when the upper term is imposed, it was justified based on Franklin's prior convictions, which *Blakely* expressly exempts from the requirement of jury determination. However, Franklin's sentence had already been increased by five years, one year for each of five prior convictions, and those convictions may not serve "double duty" in sentencing. (See fn. 3, *ante*.)

Nevertheless, if there were factors not subject to *Blakely*'s requirement of a jury determination, we may affirm. "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen the lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.) "Only a single aggravating factor is required to impose the upper term . . . ." (*People v. Osband* (2004) 13 Cal.4th 622, 728.) The fact of a prior conviction may be used to increase a sentence beyond the statutory maximum without a specific finding by the jury. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224.) The exception to the *Apprendi* rule for prior convictions has been construed to apply to other facts related to a defendant's recidivism. (See, e.g., *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.)

In this case, the trial court did not specify which factors, other than recidivism, it was relying on. However, to the extent the trial court may have sentenced Franklin to the

upper term because he was a danger to society (see Cal. Rules of Court, rule 4.421(b)(1)), which was implicated in the judge's statements at the sentencing, any error was harmless. Rule 4.421(b)(4) of the California Rules of Court allows for imposition of the upper term where "[t]he defendant was on probation or parole when the crime was committed." There is no dispute that Franklin was on parole when he committed the 1998 crime. Further, there was one additional prison term for which his sentence was not enhanced by a year. These objective factors did not need to be decided by a jury, and there were no mitigating circumstances in the probation report against which to balance them. Accordingly, it is not reasonably likely a different result would be reached if the matter were remanded for resentencing. (*People v. Sandoval, supra,* 30 Cal.App.4th at p. 1303.)

DISPOSITION

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Corrigan, J.